90-25

No. ____

IN THE

Supreme Court of the United States

October Term 1989

JOHN J. DILLON III, Commissioner of the Department of Insurance of the State of Indiana, and the Department of Insurance of the State of Indiana,

Petitioners,

v.

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc. of Indiana, and Medical Liability Purchasing Group, Inc. of Indiana,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the United States Court of Appeals for the Seventh Circuit, in a question of first impression, improperly decided that the State of Indiana does not have a right of action to enforce §3903(f) of the Risk Retention Act, 15 U.S.C. §3903(f), in a United States District Court, thereby rendering the 1986 amendments to that Act meaningless.

LIST OF PARTIES

The parties to this Petition are Petitioners, John J. Dillon III, Commissioner of Insurance of the State of Indiana, and the Department of Insurance of the State of Indiana; and Respondents, Ted Allen Combs, individually and as President of Medical Liability Purchasing Group, Inc. of Indiana, and Medical Liability Purchasing Group, Inc. of Indiana.

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

Petitioners, John J. Dillon III, Commissioner of the Department of Insurance of the State of Indiana and the Department of Insurance of the State of Indiana (hereinafter "State of Indiana"), respectfully pray the Court issue a Writ of Certiorari to review the Judgment of the United States Court of Appeals for the Seventh Circuit (hereafter the "Seventh Circuit") entered in Case Number 89-2550 on February 15, 1990, the petition for rehearing and suggestion of rehearing in banc having been denied April 3, 1990. The Seventh Circuit reversed and remanded this cause to the United States District Court

for the Southern District of Indiana, New Albany Division (hereafter the "District Court") with instructions to dismiss this action for lack of jurisdiction, holding the State of Indiana lacked standing. The District Court had enjoined the respondents from soliciting business in every State of the United States and had frozen Medical Licensing Purchasing Group, Inc.'s funds.

OPINIONS BELOW

The decision of the Seventh Circuit denying Petitioners' request for rehearing and suggestion of rehearing *in banc* was issued on April 3, 1990. A copy of that Order has been included in the appendix at page A-1. The decision of the Seventh Circuit reversing and remanding this cause to the District Court was issued on February 15, 1990. A copy of the Seventh Circuit's opinion is included in the appendix at page A-2. The Decision of the District Court was entered on June 22, 1989. Copies of the District Court's Findings of Fact, Conclusions of Law, and Order and the Judgment are included in the appendix at pages A-7 and A-15 respectively.

JURISDICTION

The jurisdiction of the Court is invoked pursuant to 28 U.S.C. §1254 and Rule 13 of this Court. The decision of the Seventh Circuit was entered on February 15, 1990. This decision was reviewed on April 3, 1990, when the Seventh Circuit denied Petitioners' Petition for Rehearing and Suggestion of Rehearing In Banc. This petition is timely filed in that it is filed prior to the expiration of the ninety (90) day period allowed by 28 U.S.C. §2101(c) and Rule 13.4, Rules of the Supreme Court of the United States, as measured from the issuance of the denial of Petitioners' Petition for Rehearing and Suggestion of Rehearing In Banc as provided by Rule 20.4, Rules of the Supreme Court of the United States.

STATUTORY PROVISIONS

15 U.S.C. 1011 provides:

> Congress declares that the continued regulation and taxation by the several States of the business of insurance is in the public interest, and that silence on the part of the Congress shall not be construed to impose any barrier to the regulation of such business by the several States.

5 U.S.C. 3903 provides in pertinent part:

> (a) Except as provided in this section, a purchasing group is exempt from any State law, rule, regulation, or order to the extent that such law, rule, regulation, or order would —
>
> (1) prohibit the establishment of the purchasing group;
>
> (2) make in unlawful for an insurer to provide or offer to provide insurance on a basis providing, to a purchasing group or its members, advantages, based on their loss and expense experience, not afforded to other persons with respect to rates, policy forms, coverages, or other matters;
>
> (3) prohibit a purchasing group or its members from purchasing insurance on the group basis described in paragraph (2) of this subsection;
>
> (4) prohibit a purchasing group from obtaining insurance on a group basis because the group has not been in existence for a minimum period of time or because any member has not belonged to the group for a minimum period of time;
>
> (5) require that a purchasing group must have a minimum number of members, common ownership or affiliation, or a certain legal form;
>
> (6) require that a certain percentage of a purchasing group must obtain insurance on a group basis;

(7) require that any insurance policy issued to a purchasing group or any members of the group be countersigned by an insurance agent or broker residing in that State; or

(8) otherwise discriminate against a purchasing group or any of its members.

* * *

(c) State may require that a person acting, or offering to act, as an agent or broker for a purchasing group may obtain a license from that State, except that a State may not impose any qualification or requirement which discriminates against a nonresident agent or broker.

(d) (1) A purchasing group which intends to do business in any State shall furnish notice of such intention to the insurance commissioner of such State. Such notice —

(A) shall identify the State in which such group is domiciled;

(B) shall specify the lines and classifications of liability insurance which the purchasing group intends to purchase;

(C) shall identify the insurance company from which the group intends to purchase insurance and the domicile of such company; and

(D) shall identify the principal place of business of the group.

(2) Such purchasing group shall notify the commissioner of any such State as to any subsequent changes in any of the items provided in such notice.

(e) A purchasing group shall register with and designate the State insurance commissioner of each State in which it does business as its agent solely for the purpose of receiving service of legal documents or process, except that such requirement shall not apply in the case of a purchasing group —

(1) which —

(A) was domiciled before April 1, 1986; and

(B) is domiciled on and after September 25, 1981;

in any state of the United States;

(2) which —

(A) before September 25, 1981, purchased insurance from an insurance carrier licensed in any State; and

(B) since September 25, 1981, purchases its insurance from an insurance carrier licensed in any State;

(3) which was a purchasing group under the requirements of this chapter before October 27, 1986; and

(4) as long as such group does not purchase insurance that was not authorized for purposes of an exemption under this chapter as in effect before October 27, 1986.

(f) A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the pur- chase is effected through a licensed agent or broker action pursuant to the surplus lines and regulations of such State.

(g) Nothing in this chapter shall be construed to affect the authority of any State to make use of any of its powers to enforce the laws of such State with respect to which a purchasing group is not exempt under this chapter.

(h) Nothing in this chapter shall affect the authori- ty of any State to bring an action in any Federal or State court.

STATEMENT OF THE CASE

A. Nature of the Case

Petitioners brought this action to enjoin respondents from violating both 15 U.S.C. §3903(f) and state law. Respondents had been soliciting medical doctors and entities to purchase medical malpractice insurance through them although respondents were not using a licensed agent or broker acting pursuant to Indiana's surplus lines law. Petitioners alleged jurisdiction in the District Court pursuant to 28 U.S.C. §1331 and 15 U.S.C. §3901, *et seq.*

The District Court found that it had jurisdiction to hear this case. Upon hearing evidence for a preliminary injunction, the District Court advanced the hearing on the merits and granted permanent relief. The District Court found that respondents were not only selling insurance without the necessary surplus lines agent, but were also perpetrating a fraud. The District Court froze the respondents' assets and ordered them to refrain from soliciting business in every state.

The Seventh Circuit, on appeal by the respondents, reversed the decision of the District Court on the grounds that the States do not enjoy a private right of action to enforce the provisions of 15 U.S.C. 3903 in the federal courts. The basis for the Seventh Circuit's decision had not been briefed prior to the Seventh Circuit's decision. This Court has not ruled upon this issue.

B. Facts

Ted Allen Combs is the president of Medical Liability Purchasing Group, Inc. (hereinafter "MLPG"). Combs was asked to incorporate MLPG by his uncle, Edmund Burke, a vice-president of Casualty Assurance Risk Insurance Brokerage Company (hereinafter "CARIB"), a Guam corporation. CARIB used Combs and MLPG as a front to solicit applications for medical malpractice insurance from doctors, hospitals, clinics, podiatrists, psychologists, and emergency medical technicians across the United States. The solicitations claimed

that CARIB is a competent United States domiciled carrier that reports to a United States Insurance Commissioner and files reports with the National Association of Insurance Commissioners. These solicitations were made despite the fact that the only state in which MLPG was registered as an authorized liability purchasing group was New Mexico, and that CARIB, the only insurer used by MLPG was licensed only in Guam.

MLPG maintained a mailbox in Jeffersonville, Indiana. However, all mail was forwarded to CARIB's Washington, D.C. office. In fact, telephone calls to MLPG were rerouted to the Washington, D.C. offices of CARIB. The solicitations sent out by MLPG were prepared by CARIB, and correspondence sent over Combs' signature stamp was prepared by CARIB.

Although Combs was aware that CARIB had been issued cease and desist orders in several states, he had not stopped soliciting business in those states. Indeed, although Combs had been advised by several states to cease activities as a purchasing group, MLPG continued its activities.

REASON FOR ALLOWANCE OF THE WRIT

THE SEVENTH CIRCUIT'S CONSTRUCTION OF 15 U.S.C. §3903 MAKES THE 1986 AMENDMENTS MEANINGLESS; UNDER THAT CONSTRUCTION, THE STATES HAVE NO POWER TO REGULATE PURCHASING GROUPS UNDER THE RISK RETENTION ACT.

The granting of a writ of certiorari in this case is necessary to resolve a new question of law, whether the states have a right to seek redress in federal courts to regulate purchasing groups under the Risk Retention Act, 15 U.S.C. §§3901-03. Since the states have been given the duty of regulating the insurance industry under the McCarran-Ferguson Act, 15 U.S.C. §§1011-15, if the states are not allowed to use all means available to regulate the insurance industry, no one will be available to regulate that aspect of the industry. This, therefore, is an important issue of federal law that has not been, but should be,

settled by this Court. Rule 10.1(c), Rules of the United States Supreme Court.

In 1981, Congress passed the Product Liability Risk Retention Act of 1981, Pub. L. 97-45, 95 Stat. 949, 15 U.S.C. §§3901-03. As noted in the Seventh Circuit's decision, Slip Opinion, pp. 1 and 2, the Product Liability Risk Retention Act overrides the privilege states otherwise enjoy under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15, to regulate all aspects of insurance, by exempting risk retention groups and most purchasing groups from state regulation. The Product Liability Risk Retention Act has been amended twice, once in 1983 and again in 1986. The construction to be given to the 1986 amendments is the issue here.

The 1986 amendments to the Product Liability Risk Retention Act added subsections (d) through (h) to §3903. Those amendments have been set out in full on pages 3 through 5, *supra*.

In construing statutes, the courts should not give a construction that would render certain provisions superfluous or insignificant or seriously impair the effectiveness of the statute. *Sunshine Anthracite Coal Company v. Adkins*, 310 U.S. 381 (1940); *Bird v. United States*, 187 U.S. 118 (1902); *see also*, *Woodfork v. Marine Cooks & Stewards Union*, 642 F.2d 966 (5th Cir. 1981). Rather, the courts must assume that Congress intended its enactments to have meaningful effect. Statutes should be construed, if possible, to give them such effect. *United States v. American Trucking Associations, Inc., et al.*, 310 U.S. 534 (1940); *The Church of the Holy Trinity v. United States*, 143 U.S. 457 (1892); *see also*, *National State Bank of Elizabeth, N. J. v. Smith*, 591 F.2d 223 (3rd Cir. 1979). Indeed, interpretations of a statute which would produce absurd results should be avoided. *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564 (1982).

The legislative history of the 1986 amendments as they relate to purchasing groups is scant, at best. However, on pages 17-18 of House Report No. 99-865, 1986 U. S. Code Congressional and Administrative News, pp. 5314-5315, the Committee dis-

cussed the addition of subsections (d) and (e). The Committee stated:

> The Committee has been presented with allegations regarding commercial abuses by organizations purporting to act under color of the exemptions provided by the 1981 Act. *The provisions of this section have been added to the law to provide the States with improved ability to monitor for and take action to prevent abuses from occurring.* The notice requirements are designed to give the insurance regulator notice and opportunity to exercise regulatory oversight and the requirement regarding registration for service of process is intended to facilitate appropriate corrective action by eliminating the possibility that the commissioner will have difficulty providing adequate notice to the group or serving appropriate legal process. (Emphasis added.)

Clearly, there is an intent expressed by Congress that the states' regulatory functions, as regards purchasing groups, are expanded under the amendments.

Curiously, the legislative history is silent regarding subsection (h) of §3903. However, the fact that that subsection was added must have some meaning. If the states do not have standing to bring actions to enforce the Risk Retention Act, then the addition of subsection (h) is meaningless. Unless the states have authority to bring an action under this chapter, the language of subsection (h) is senseless. Rather, the spirit of the 1986 amendments, as regarding purchasing groups, intentionally expands the role of the states to monitor and regulate purchasing groups. However, if the states lack standing to enforce the 1986 amendments, then those amendments have no enforcement mechanism at all. Such an interpretation leads to an absurdity and should be avoided.

Under the Seventh Circuit's decision, if a purchasing group which operates in all the states is operating in violation of the Risk Retention Act, such as Medical Liability Purchasing Group, Inc. of Indiana was found by the District Court to be so

operating, a state cannot seek to stop the purchasing group's illegal activity in any state other than its own. Under the Seventh Circuit's decision, each of the fifty states would be required to bring actions in state courts to cause the miscreant purchasing group to cease its interconnected illegal activities which violate *federal* law. This result is not tenable and cannot have been intended by Congress. Federal jurisdiction is clearly present under 28 U.S.C. §1331 because of 15 U.S.C. §3903(d) through (h); the *Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763 (7th Cir. 1987), and RICO analogy made by the Seventh Circuit *does not fit* the legislative history of *this* act.

The Risk Retention Act, as originally passed, was intended to benefit certain segments of the public by exempting purchasing groups from excessive regulation by the states. However, by the time of the 1986 amendments, Congress realized that such total freedom from regulation was not wise. As shown above, the 1986 amendments were adopted to return to the states the power to regulate certain aspects of the activities of purchasing groups. The purpose of state regulation is to prevent abuses by unscrupulous insurance providers. If the states lack the ability to enforce the consumer-oriented provisions of the Risk Retention Act in federal courts, then no one will be left to enforce the act. By Congressional design, the insurance industry is regulated by the states, not the federal government. Clearly, Congress could not have intended to give the states specific regulatory rights and duties without conferring upon them the right to enforce those rights in a forum with national enforcement powers. Indeed, the wording of 15 U.S.C. §3903(h) clearly implies that Congress intended the states to be able to bring an action in federal court to enforce the amendments. Any other interpretation of the amendments eviscerates the statute.

Unless the states can use all means necessary to protect the public from improper activities, as those found by the District Court to have been perpetrated by Combs and MLPG, the public will lie prey to such unscrupulous actors as Combs and

MLPG. This cannot be the intent of the 1986 amendments to the Risk Retention Act.

The 1986 amendments to the Risk Retention Act must have meaning. The Seventh Circuit's decision holding that the State of Indiana lacks standing to bring suit in District Court deprives the amendments of any real meaning. Therefore, this Court should grant the petition for a writ of certiorari, review the decision of the Seventh Circuit, reverse the deci- sion of the Seventh Circuit, and affirm the decision of the District Court.

CONCLUSION

The United States Court of Appeals for the Seventh Circuit erred in determining that the States do not have a direct right of action to enforce the Risk Retention Act in federal court. This is an important question of law that has not been settled by this Court. Therefore, the Petitioners, John J. Dillon III, Commissioner of the Department of Insurance of the State of Indiana, and the Department of Insurance of the State of Indiana, respectfully pray the Court grant this Petition for Writ of Certiorari to review the decision of the Seventh Circuit.

Respectfully submitted,

Linley E. Pearson
Attorney General of Indiana

Terry G. Duga
Deputy Attorney General

TGD/mt:7099D

APPENDIX

No. 89-2550

FOR THE SEVENTH CIRCUIT
CHICAGO, ILLINOIS 60604

United States Court of Appeals

April 3, 1990

Before

HON. HARLINGTON WOOD, JR., CIRCUIT JUDGE
HON. JOEL M. FLAUM, CIRCUIT JUDGE
HON. FRANK H. EASTERBROOK, CIRCUIT JUDGE

JOHN J. DILLON III, Commissioner of Insurance, and the DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA, *Plaintiffs-Appellees*, No. 89-2550 v. TED ALLEN COMBS, and MEDICAL LIABILITY PURCHASING GROUP, INC., OF INDIANA, *Defendants-Appellants*.	Appeal from the United States District Court for the Southern District of Indiana, New Albany Division. No. NA 89-72-C S. Hugh Dillin, *Judge*

ORDER

Plaintiffs-Appellees filed a petition for rehearing and suggestion of rehearing en banc on March 1, 1990. No judge in regular active service has requested a vote on the suggestion of rehearing en banc, and all of the judges on the panel have voted to deny rehearing. The petition for rehearing is therefore DENIED.

In the
United States Court of Appeals
For the Seventh Circuit

No. 89-2550

JOHN J. DILLON III, Commissioner of the Department of Insurance of the State of Indiana, and the DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA,

Plaintiffs-Appellees,

v.

TED ALLEN COMBS, individually and as President of Medical Liability Purchasing Group, Inc., of Indiana, and MEDICAL LIABILITY PURCHASING GROUP, INC., OF INDIANA,

Defendants-Appellants.

Appeal from the United States District Court
for the Southern District of Indiana, New Albany Division.
No. NA 89-72-C—**S. Hugh Dillin**, *Judge*.

ARGUED JANUARY 26, 1990—DECIDED FEBRUARY 15, 1990

Before WOOD, JR., FLAUM, and EASTERBROOK, *Circuit Judges*.

EASTERBROOK, *Circuit Judge*. Concerned that state laws frustrated the formation of "purchasing groups" to serve as intermediaries in the insurance business, Congress enacted the Product Liability Risk Retention Act of 1981, Pub. L. 97-45, 95 Stat. 949, 15 U.S.C. §§ 3901-03. This statute overrides the privilege states otherwise enjoy under the McCarran-Ferguson Act to regulate all aspects of

the insurance business. Section 3903 exempts most "purchasing groups" (that is, middlemen between clients and insurers) from state regulation. Many an exemption has a catch. In 1986 Congress concluded that the original bill went too far, and while making other changes the legislature added §3903(f), which provides:

> A purchasing group may not purchase insurance from a risk retention group [*i.e.*, an underwriter] that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State.

Pub. L. 99-563, 100 Stat. 3178. "Surplus lines laws" refer to assigned risk pools, and the principal function of §3903(f) is to require a purchasing group that does not use an underwriter licensed in the state to employ the same procedures—including registering as an agent or broker, or placing insurance through one—as other assigned risk intermediaries.

Indiana believes that Ted Allen Combs and his Medical Liability Purchasing Group, Inc., of Indiana, are violating both state law and §3903(f) by soliciting purchases of medical malpractice insurance without using "a licensed agent or broker acting pursuant to [Indiana's] surplus lines laws". Combs holds a license to sell insurance in Indiana. He tried to register to sell surplus lines insurance, but state officials turned him down on the ground that *no one* may sell surplus lines insurance for medical malpractice in Indiana, because that state has its own assigned risk pool. Because the state's pool accepts all applicants, Indiana is of the view that there is no need for private surplus lines agents or brokers. Combs responds that this approach would make hash of the general rule in §3903(a)(1), (8) that purchasing groups are exempt from state laws that "prohibit the establishment of a purchasing group" or "otherwise discriminate against a purchasing group". Indiana told Combs and his firm to stop soliciting. They ignored the

demand, and Indiana sued. Indiana argued, and the district court found, that Combs and his firm not only are selling without the necessary surplus lines agent but also are perpetrating a fraud, representing that they place policies with reputable insurers licensed in the United States when all the business went to Casualty Assurance Risk Insurance Brokerage Company, an affiliated enterprise (run by Combs' uncle) incorporated in Guam and not licensed to underwrite in any state. The district judge froze the defendants' funds and ordered them to stop soliciting business in every state.

The only issue we need decide is whether there is jurisdiction. Indiana invoked federal-question jurisdiction, 29 U.S.C. §1331, on the theory that Combs and firm are "violating" §3903(f) as well as state law. It is far from clear to us that §3903(f) contains a rule that could be "violated", as opposed to limits on the scope of the preemption established by the rest of §3903. Despite the mandatory language of §3903(f), the section as a whole (indeed, the statute as a whole) is designed to preempt state laws that hamper purchasing and risk retention groups. Everyone assumed that if preemption were unavailable, state law would govern. Indiana has a law much like §3903(f). See Ind. Code §27-7-10-27(a). It concedes that it could have filed this suit in state court and obtained personal jurisdiction over both defendants. If federal preemption fails, the legal obligations are established by state law, and there is no federal question. See *Franchise Tax Board v. Laborers Vacation Trust*, 463 U.S. 1, 27-28 (1983); *Christianson v. Colt Industries Operating Corp.*, 108 S. Ct. 2166, 2173-75 (1988). If, however, §3903(f) establishes an independent obligation, then there might be jurisdiction under §1331 even though state law also proscribes the same acts.

We need not decide whether §3903(f) imposes legal obligations (as opposed to delimiting the extent of preemption). A federal rule of decision is necessary but not sufficient for federal jurisdiction. There must also be a right of action to enforce that rule. *Merrell Dow Pharmaceuticals Inc. v. Thompson*, 478 U.S. 804, 807-12 (1986). Sec-

tion 1331 does not furnish it. Unless the defendant is a state actor, so that 42 U.S.C. §1983 may supply the right of action, see *Golden State Transit Corp. v. Los Angeles*, 110 S. Ct. 444 (1989), the entitlement to enforce the federal rule generally must be found within the statute in question. Here Indiana comes up short: the Risk Retention Act does not create a private right to enforce §3903(f). Quite the contrary, §3903(g) says that "[n]othing in this chapter shall be construed to affect the authority of any State to bring an action in any Federal or State court." See also §3903(e). A law that does not "affect" the ability of a state to sue hardly creates a right of action. Another part of the Risk Retention Act, 15 U.S.C. §3906, added in 1986, does create a federal right of action. Section 3906 says that a district court may enjoin a risk retention group from underwriting insurance if "such group is in hazardous financial condition." Combs' firm is a purchasing group, not a risk retention group. The express right of action in §3906 stands in contrast to the no-effect clause of §3903(g). What remains is the conclusion that there is no private right of action to enforce §3903(f) in federal court.

Indiana believes that Combs and firm committed fraud by using the mails, and some federal anti-fraud laws contain express rights of action. Prominent among these is the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. §1964. Indiana does not contend, however, that *it* is a victim of fraud, and RICO does not authorize a state to obtain relief on account of a fraud practiced against its residents. *Illinois v. Life of Mid-America Insurance Co.*, 805 F.2d 763 (7th Cir. 1986); *New York v. Seneci*, 817 F.2d 1015 (2d Cir. 1987). RICO allows suits by the federal government, §1964(b), but otherwise only by persons injured in their "business or property", §1964(c), a phrase that does not include sovereign or derivative interests. *Hawaii v. Standard Oil Co.*, 405 U.S. 251 (1972); cf. *Carter v. Berger*, 777 F.2d 1173 (7th Cir. 1985). A state has its own laws and ample access to its own courts, through which it may protect its residents

from fraud. No other express right of action comes to mind (the state suggests none), which leaves us in the usual position that when Congress did not enact a right of action, there is no federal jurisdiction.

Cases such as *Cort v. Ash*, 422 U.S. 66 (1975), hold open the possibility that clear legislative history, with statutory language creating personal entitlements, may create a right of action even though the statute is silent. Section 3903 is a prohibitory rule, not a statute creating entitlements. Compare *Cannon v. University of Chicago*, 441 U.S. 677 (1979), with *Touche Ross & Co. v. Redington*, 442 U.S. 560 (1979). Any entitlements would belong to those who seek to purchase insurance, not to state regulatory agencies. The Risk Retention Act as a whole is designed to throttle the states, not to empower them. And the legislative history is silent. Committee reports describe the substance of §3903(f) without hinting that the rule would be enforceable in federal litigation. H.R. Rep. No. 99-865, 99th Cong., 2d Sess. 17 (1986). Compare *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran*, 456 U.S. 353 (1982), with *Karahalios v. National Federation of Federal Employees*, 109 S. Ct. 1282 (1989).

Text, structure, and history of §3903(f) all point to nonenforcement in federal court. States possess ample power to enforce in their own courts not only the principles of state law (to the extent they survive preemption) but also anything §3903(f) adds to state rules. The judgment of the district court is vacated, and the case is remanded with instructions to dismiss the complaint for want of jurisdiction.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

BETTYE L. FOY, as Acting Commissioner of the Department of Insurance of the State of Indiana,
THE DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA,

Plaintiffs, NO. NA 89-72-C

-vs-

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc., of Indiana,
MEDICAL LIABILITY PURCHASING GROUP, INC. OF INDIANA,

Defendants.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This cause came on to be heard on plaintiff's application for a preliminary injunction. Plaintiffs and the defendant corporation appeared by counsel; the defendant Ted Allen Combs appeared in person and by counsel. The Court, having heard the evidence, and being fully advised, now makes the following findings of fact and conclusions of law:

Findings of Fact

1. The Indiana Department of Insurance (the Department) is an agency of the State of Indiana, created pursuant to Indiana Code 27-1-1-1 *et seq.*, and is solely charged with enforcement of all insurance laws affecting citizens in the State of Indiana, pursuant to the Risk Retention Act of 1981 and the 1986 amendments thereto, as codified at 15 U.S.C. §3903 *et seq.*

2. Bettye L. Foy is the duly appointed Acting Commissioner of Insurance for the State of Indiana and as the legal representative of the Department, is authorized by law to bring an action for injunctive relief against an Indiana-domiciled corporation seeking registration as a purchasing group.

3. Ted Allen Combs (Combs) is President of defendant Medical Liability Purchasing Group, Inc. of Indiana (MLPG) and one of the two members of the Board of Directors of MLPG. MLPG was issued a Certificate of Incorporation by the Indiana Secretary of State on July 22, 1988. Combs was issued a property and casualty insurance agent's license by the Department on September 15, 1988 but has been denied licensure as an Indiana surplus lines agent, which said license denial matter is presently under petition for administrative review pursuant to the Indiana Administrative Adjudication Act, I.C. 4-21.5-1-1 *et seq*. MLPG is nonregistered as a purchasing group in all states except New Mexico.

4. Combs was loaned the start-up money for MLPG from Ed Burke, a Vice-Presidnet of Casualty Assurance Risk Insurance Brokerage Company (CARIB). CARIB is not admitted as an insurer in any state. It is incorporated in Guam. CARIB employees drafted the solicitations sent by MLPG to healthcare providers, negotiated with the company which provided the list of doctors solicited, and designed MLPG's letterhead. Also, CARIB employees receive and open all of MLPG's mail, and handle all telephone inquiries. MLPG has never paid for these services. MLPG's "office" in Jeffersonville, Indiana is a storefront containing only a desk, one chair and a telephone. There are no employees. Combs has resided since January, 1989 in Washington, D.C., and does business from CARIB's offices, where he is receiving "training." MLPG's address is a post office box in Jeffersonville, Indiana. All mail sent to that post office box is forwarded to CARIB's Washington, D.C., office for handling by CARIB. MLPG does not have a telephone number in its name. All calls to the telephone number on its mail solictiations are transferred via call forwarding to CARIB's Washington, D.C., office. MLPG's check-

ing account requires the signature of L. Allen Bramson, a Vice-President of CARIB, for all withdrawals and checks, including the paychecks of Combs. Combs' salary negotiated by Ed Burke, a Vice-President of CARIB, who happens to be Combs' uncle. Martin Jano, President of CARIB, who is an attorney, writes the majority of MLPG's letters, which are signed with the rubber-stamp signature of Ted Allen Combs. Combs has not seen much of the correspondence sent or received by MLPG. John James, who also writes letters as an "administrative assistant" to Combs, is a cousin of Martin Jano. Combs has never met John James, who lives in Guam.

5. Title 15 U.S.C. §3901(5) defines a "purchasing group" as "any group which — (A) has as one of its purposes the purchase of liability insurance on a group basis; (B) purchases such insurance only for its group members and only to cover their similar or related liability exposure, as described in subparagraph (C); (C) is composed of members whose businesses or activities are similar or related with respect to the liability to which members are exposed by virtue of any related, similar, or common business, trade, product, services, premises, or operations; and (D) is domiciled in any State." MLPG has never purchased insurance on a group basis.

6. On or about September 15, 1988, Combs, as President of MLPG, forwarded documents to the Department seeking to qualify MLPG as an Indiana-domiciled purchasing group. On September 30, 1988, MLPG was requested by the Indiana Attorney General to cease and desist purchasing group activities on the basis that it was not properly registered as a purchasing group under 15 U.S.C. §3901 *et seq.* and I.C. 27-7-10-1 *et seq.*

7. Title 15 U.S.C. §3903 provides: "A purchasing group may not purchase insurance from a risk retention group that is not chartered in a State or from an insurer not admitted in the State in which the purchasing group is located, unless the purchase is effected through a licensed agent or broker acting pursuant to the surplus lines laws and regulations of such State."

8. Indiana law regarding surplus lines insurance defines all such business in terms of surplus lines agents, as surplus lines insurance business is that which a licensed agent "after diligent effort was unable to procure from any authorized insurer or insurers authorized to transact the particular class of insurance business in Indiana the full amount of insurance required to protect the insured, and that such insurance as may be placed under the provisions of the chapter is not placed for the purpose of procuring it at a premium rate lower than would be accepted by any insurer authorized and licensed to transact such insurance business in Indiana." I.C. 27-1-15.5-5(c). MLPG has never had an Indiana-licensed surplus lines agent through which to place business and has never made any effort to procure malpractice insurance from an insurer authorized to transact such business in Indiana.

9. Medical malpractice insurance cannot be sold in Indiana under surplus lines laws because Indiana has the Indiana Residual Malpractice Insurance Authority (IRMIA), established pursuant to the Indiana Medical Malpractice Act (I.C. 16-9.5-1 *et seq.*), which accepts any healthcare providers who cannot obtain malpractice coverage from an Indiana-admitted insurer. IRMIA has never refused coverage to any healthcare provider; therefore, it would not be possible for a surplus lines agent to meet the "diligent effort" requirement of I.C. 27-1-15.5-5(c)(4) in order to place medical malpractice business with an authorized insurer.

10. MLPG has only had CARIB as an insurer. CARIB is domiciled in Guam and is not admitted as an insurer in Indiana or any other State. MLPG has never had an Indiana-licensed surplus lines agent for placement of business with CARIB. Therefore, pursuant to 15 U.S.C. §3903, MLPG cannot be registered as a purchasing group in Indiana. The lack of an Indiana admitted insurer and failure to qualify under surplus lines laws of Indiana are the basis of the Department's denial of MLPG's registration as a purchasing group.

11. MLPG has mailed several thousand medical malpractice insurance solicitations to physicians and other healthcare pro-

viders all over the United States which state: "Medical Liability Purchasing Group, Inc. of Indiana is an authorized liability purchasing group formed under Indiana law and the 1986 'Federal Risk Retention Act' that authorizes a purchasing group to obtain difficult to find and expensive liability coverage for its members only. Our Association has obtained a qualified and competent United States domiciled carrier to service the medical malpractice liability needs of our members. Our carrier reports to a United States insurance commission, files quarterly statements and annual statements with the National Association of Insurance Commissioners (N.A.I.C.) and has the financial strength and reinsurance connections to support the integrity of the policy issued. . . . Our association of more than 4,000 members has the bargaining power to obtain less than a company's usual market rates for it's members with licensed U.S. companies and not any off-shore captives or foreign companies."

These statements, which have induced thousands of physicians and other healthcare providers who received them to purchase insurance through CARIB, are false and deceptive for the following reasons:

a. Medical Liability Purchasing Group, Inc. of Indiana has never been registered as a purchasing group in Indiana or under Indiana law or the 1986 Federal Risk Retention Act.

b. CARIB, the only insurer of MLPG, is domiciled in Guam, which is not a State of the United States; therefore CARIB is not a United States domiciled carrier.

c. CARIB has never been licensed as a insurer in any State.

d. Being domiciled in Guam, CARIB is both foreign and off-shore.

e. CARIB is not recognized by the National Association of Insurance Commissioners.

f. The Insurance Commissioner of Guam, Joaquin Blaz, described CARIB as being in its "infancy" and warned the Department in October of 1988: "We suggest that you be very cautious in admitting this company to do business in your jurisdiction." Therefore, CARIB lacks the "financial strength" claimed in its solicitations.

g. MLPG is merely a front for CARIB, an insurer not authorized in any State.

12. MLPG has continued to mail solicitations for medical malpractice insurance in the following States, despite being ordered or requested to cease and desist purchasing group activities: Hawaii, Florida, Washington, Wisconsin, Kentucky, Maryland, Idaho, Pennsylvania, North Dakota, and Indiana.

13. MLPG has further violated 15 U.S.C. §3901(5) as follows:

a. There is no group liability policy; each "member" of MLPG who has purchased insurance from CARIB has an individual policy of insurance.

b. The "members" of MLPG have dissimilar business activities; MLPG "members" include a substantial number of entities, such as clinics, as well as osteopaths, medical doctors from every medical specialty, hospitals, nurses, therapists and counselors.

14. The operation of MLPG is merely a front for CARIB's direct-mail solicitation for medical malpractice business. On CARIB's 1987 Annual Statement, it listed $1,202,492 as the amount of premium it received throughout the United States, none of which came from Guam. In 1988, CARIB's Annual Statement lists $3,235,293 in premium collected throughout the United States, also with none from Guam, the only place it is qualifed to do business as an insurer. All or most of the premium received by CARIB, as reflected on its 1988 Annual Statement, came as a result of its direct-mail solicitation under the guise of MLPG.

Conclusions of Law

1. The Court has jurisdiction of the subject matter of this action. 28 U.S.C. §1331.

2. There is no possibility that the facts above found would change on a further hearing. Therefore, trial on the merits is advanced and consolidated with the hearing of the application for a preliminary injunction. Rule 65(a)(2), F.R.Civ.P.

3. The defendants are in violation of the laws of the United States, including, but not limited to the Risk Retention Act, 15 U.S.C. §3901, *et seq.*, and the laws relating to mail and wire fraud, 18 U.S.C. §§1341, 1342, and 1343.

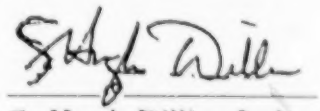
4. Plaintiffs are entitled to a permanent injunction against the defendants, enjoining them from the authorized transaction of purchasing group business within the State of Indiana and all other States, territories and possessions of the United States; from soliciting applications for medical malpractice liability insurance and from collecting or receiving premiums in Indiana or any other State, territories or possessions of the United States; and from making payment on any claims pursuant to any policy from any account maintained with a financial institution or other entity in which any premiums collected from healthcare providers solicited via MLPG have been deposited.

5. Such injunction will serve the public interest, without which plaintiffs and the public would be irreparably injured, as having no adequate remedy at law.

6. The defendants should be ordered to supply the Department with an accounting of all funds or premiums collected by defendants pursuant to any purchasing group activities and to account for all disbursements of such funds, to supply the Department with a complete list of the names and addresses of each and every healthcare provider solicited for medical malpractice insurance; and to produce to the Department all documents in their possessions or control relating or referring to their activities, within thirty (30) days from this date.

7. The defendants should also be ordered to provide the Department with the name of each and every financial institution or other entity in which any premiums or commissions received from healthcare providers solicited via MLPG have been deposited and with each respective account number therefor within twenty (20) days from this date, and to refrain from withdrawing or expending any funds received from purchasing group activities until further ordered by this Court.

Dated this 22nd day of June, 1989.



S. Hugh Dillin, Judge

Copies to:

Linley E. Pearson, Attorney General of Indiana, 219 State House, Indianapolis, Indiana, 46204 (Samuel L. Bolinger, Deputy)

James L. Petersen, One American Square, Box 82001, Indianapolis, Indiana 46282

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF INDIANA
NEW ALBANY DIVISION

BETTYE L. FOY, as Acting Commissioner of the Department of Insurance of the State of Indiana,
THE DEPARTMENT OF INSURANCE OF THE STATE OF INDIANA,

Plaintiffs,) NO. NA 89-72-C

-vs-

TED ALLEN COMBS, Individually and as President of Medical Liability Purchasing Group, Inc., of Indiana,
MEDICAL LIABILITY PURCHASING GROUP, INC. OF INDIANA,

Defendants.)

ORDER AND JUDGEMENT

This cause having been heard by the Court, and the Court having this day filed its Findings of Fact and Conclusions of Law, reading as follows (H.I.)

NOW THEREFORE IT IS ORDERED, ADJUDGED AND DECREED AS FOLLOWS:

1. Ted Allen Combs and Medical Liability Purchasing Group Inc., of Indiana (MLPG) are enjoined from the unauthorized transaction of purchasing group business within the State of Indiana and all other states, territories and possessions of the United States.

2. Ted Allen Combs and MLPG are enjoined from soliciting applications for medical malpractice liability insurance and from collecting or receiving premiums in Indiana or any other States, territories or possessions of the United States.

3. Ted Allen Combs and MLPG are enjoined from making payment on any claims pursuant to any policy from any account maintained with a financial institution or other entity in which any premiums collected from healthcare providers solicited by MLPG have been deposited.

4. Ted Allen Combs and MLPG are ordered to supply The Department of Insurance of the State of Indiana (the Department) with an accounting of all funds or premiums collected by defendants MLPG and Ted Allen Combs, individually and as President of MLPG, pursuant to any purchasing group activities and to account for all disbursements of such funds within thirty (30) days of this order.

5. Ted Allen Combs and MLPG are ordered to supply the Department with a complete list of the names and addresses of each and every healthcare provider solicited for medical malpractice insurance within thirty (30) days from the date of this order.

6. Ted Allen Combs and MLPG are ordered to provide the Department with the name of each and every financial institution or other entity in which any premiums or commissions received from healthcare providers solicited by MLPG or Ted Allen Combs have been deposited and with each respective account number therefor within twenty (20) days of this order.

7. Ted Allen Combs and MLPG are ordered to produce to the Department all documents in their possession or control relating or referring to their purchasing group activities within thirty (30) days from the date of this order.

8. Ted Allen Combs and MLPG are ordered to refrain from withdrawing or expending any funds received from purchasing group activities until the further order of this Court.

So ORDERED this 22nd day of June, 1989.

S. Hugh Dillin, Judge

Copies to:

Linley E. Pearson, Attorney General of Indiana, 219 State House, Indianapolis, Indiana 46204 (Samuel L. Bolinger, Deputy)

James L. Petersen, One American Square, Box 82001, Indianapolis, Indiana 46282